No. 89-1762

Supreme Court, U.S.
FILED
MAY 14 1990
JOSEPH F. SPANIOL, CLERK

In The

Supreme Court of the United States

October Term, 1989

WILLIAM BLYTHE MYERS, JAMES ALLEN PRESTON, SPAR GAS, INC., OVAL HITCHCOCK, MARY ANN CATRON, AND WILLIAM LYLE CATRON,

Petitioners,

vs.

AP PROPANE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should the Court of Appeals grant mandamus to protect the constitutional right to jury trial where that right has been improperly denied?

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No. _____

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WILLIAM BLYTHE MYERS, JAMES ALLEN PRESTON, SPAR GAS, INC., OVAL HITCHCOCK, MARY ANN CATRON, AND WILLIAM LYLE CATRON,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Neither the decision of the Court of Appeals nor that of the District Court is reported.

JURISDICTION

The decision of the Sixth Circuit denying mandamus was dated and filed February 15, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides in relevant part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

RULES INVOLVED

Rule 65 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

STATEMENT OF THE CASE

Petitioners are a small family owned business which distributes liquid propane gas in central Tennessee, its owners and certain of its employees. Respondent is one of the largest liquid propane distributors in the United States. Respondent is also a competitor of petitioners in

central Tennessee. After respondent closed its office at Carthage, Tennessee and consolidated its operations at Lebanon, Tennessee, it fired petitioner Preston who had been manager of its Carthage office. Preston, who did not have a non-competition agreement, thereafter went to work for petitioner Spar Gas in its new Carthage office. Preston thereafter employed, on behalf of Spar Gas, a tank wagon driver, petitioner Myers, who had left respondent's employment and who had signed a covenant not to compete. Respondent then brought this action for injunctive relief and damages for alleged breach of the covenant not to compete, tortious interference with the covenant not to compete and improper use of respondent's allegedly confidential and proprietary information.

At the hearing on respondent's motion for a temporary restraining order, the Court stated that it would hold a hearing within ten days "on a preliminary injunction, or a final injunction at one time" and "The case will be set for trial, for final hearing, on October 8th at 10:00." Thereafter, on October 1, 1987, the Court issued a temporary restraining order stating in relevant part: "A hearing on the matter of preliminary and final injunction is set in this case on October 8, 1987 at 10:00 a.m., . . . ". On October 8, 1987, the petitioners appeared for the injunction hearing. At the commencement of that hearing, the following colloquy was held:

> "Mr. Varon (Counsel for respondent): Your Honor, I will – I just want to make sure. This is for injunctive relief, right? There is no – .
>
> The Court: This is a combination of temporary and permanent injunction, period."

At the conclusion of the hearing the following colloquy occurred:

> Mr. Varon: Excuse me. Are we still going to have the damage proceeding possibly at some future point in time?
>
> The Court: If it gets to that. We're going to have that. That's right. But the primary situation here now is the injunction relief. Now, then, does anybody want to submit any briefs?
>
> * * *
>
> The Court: Because this is an injunction hearing and I've got to dispose of it. But I don't want to cut you off, because I want your briefs. It will be helpful.

Because petitioners had no right to a jury trial with respect to a hearing for either a preliminary or permanent injunction, no jury demand was made at that time.

On October 27, 1987, each of the petitioners filed a timely Answer to the Amended Complaint in which each demanded a jury trial. On December 22, 1987, the District Court issued a final injunction against the petitioners for a period of one year.

The Court then issued an order impanelling a jury for the sole purpose of determining damages. Petitioners then filed a motion for a jury trial on all issues raised by the Amended Complaint. That motion was denied by the Court. Petitioners then sought a writ of mandamus in the Sixth Circuit to compel the District Court to impanel a jury to try all issues raised by the Amended Complaint. On February 15, 1990, the Court of Appeals denied the writ.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals decision conflicts with applicable decisions of this Court.

In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959), this Court reversed the denial of mandamus relief by the Ninth Circuit, stating:

> Whatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled. [footnote, citing authorities, omitted].

In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), this Court again reversed the denial of a writ of mandamus to vacate an order striking petitioner's demand for a jury trial. The Court referred approvingly to *Beacon Theatres* as one which "emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury . . . " 369 U.S. at 472.

B. The decision of the Court of Appeals conflicts with prior precedent in the Sixth Circuit, as well as with decisions in other Courts of Appeals.

In most circuits, mandamus has been available in the Court of Appeals to review an order denying a right of trial by jury. *In re Union Nacional de Trabajadores*, 502 F.2d 113, 115-116 (1st Cir. 1974), *vacated on other grounds*, 527 F.2d 602 (1975); *Lee Pharmaceuticals v. Mishler*, 526 F.2d 1115, 1116-1117 (2d Cir. 1975); *Eldredge v. Gourley*, 505 F.2d 769, 770 (3d Cir. 1974); *General Tire & Rubber Co. v.*

Watkins, 331 F.2d 192, 194 (4th Cir.), *cert. denied*, 377 U.S. 952, 84 S. Ct. 1629, 12 L.Ed.2d 498 (1964); *Black v. Boyd*, 248 F.2d 156, 159-161 (6th Cir. 1957); *In re Vorpahl*, 695 F.2d 318, 319 (8th Cir. 1982); *Owens-Illinois, Inc. v. U.S. District Ct.*, 698 F.2d 967, 969 (9th Cir. 1983); *In re Zweibon*, 565 F.2d 742, 745-746 (D.C. Cir. 1977).

In *Black v. Boyd, supra*, the Sixth Circuit Court of Appeals, quoting this Court in *Ex parte Simons*, 247 U.S. 231 (1918), held a District Court order denying a right of trial by jury presented the exceptional circumstances justifying the issuance of a writ of mandamus by the Court of Appeals to review the ruling. In the instant case, the same Court of Appeals did not refer to *Black v. Boyd* in its order denying petitioners' writ of mandamus.

In *Kamen v. Nordberg*, 485 U.S. 939 (1988), this Court declined to review the Seventh Circuit's denial of a writ of mandamus involving the denial of a jury trial. Justice White, in dissent from the denial of the petition for a writ of certiorari, observed that the Seventh Circuit's decision in *Kamen* was not only in conflict with the majority of decisions of other Courts of Appeals, but appeared to be inconsistent with this Court's prior decisions in *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood*.

Until the Sixth Circuit's denial of petitioners' writ of mandamus in this case, the Seventh Circuit stood alone in denying review by writ of mandamus of the constitutional right to trial by jury. The majority of circuit courts of appeals have consistently held that denial of a claimed right to a jury trial is so significant an issue as to warrant review by writ of mandamus.

C. The Constitutional Right To Trial By Jury Involves A Question of Exceptional Importance.

As recently as *Lytle v. Household Manufacturing, Inc.*, 58 *U.S. Law Week* 4341 (March 20, 1990), this Court recognized its "long standing commitment to preserving a litigant's right to a jury trial." This Court has consistently held that the right to trial by jury is a basic and fundamental element of federal jurisprudence. *Simler v. Conner*, 372 U.S. 221, 222 (1963); *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354 (1943). Both this Court and the Sixth Circuit have previously held that orders denying a party a jury trial are important enough to be reviewable prior to the trial by writ of mandamus. *Beacon Theatres, Inc. v. Westover, supra; Black v. Boyd, supra.*

As this Court stated in *Ex parte Simons, supra*: "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded."

Petitioners' right to a jury trial is clear. The District Court combined a hearing on a temporary and final injunction. Petitioners had no right to demand a jury for a hearing involving only injunctive relief. Immediately after the hearing, each petitioner filed a timely Answer demanding trial by jury. The District Court denied each jury demand, resulting in petitioners being required to accept the Court's credibility determinations instead of those of the jury.

The Court of Appeals, without reference to its own precedent, followed the Seventh Circuit departing from both the precedent of this Court and the majority of the Courts of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted and the order below reversed.

Dated: Nashville, Tennessee

May 11, 1990

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

AP PROPANE, INC.,	)	
Plaintiff,	)	No. 2-87-0079
	)	HON. L. CLURE
VERSUS	)	MORTON
	)	
WILLIAM BLYTHE MYERS, ET AL.,	)	
	)	
Defendants.	)	

ORDER

Upon conducting preliminary pretrial conferences in the above-captioned case on October 12, 1989, and again on December 18, 1989, and upon consideration of the argument of counsel and the entire record herein:

IT IS HEREBY ORDERED that defendants' "Motion For Jury Trial On The Merits With Respect To All Issues Raised By The Complaint" is denied; and

IT IS HEREBY FURTHER ORDERED that plaintiff A. P. Propane, Inc.'s "Motion for Request for Pretrial Ruling That Plaintiff's Fixed Overhead Expenses Should Not Be Deducted From Its Gross Revenues In Calculating Lost Profits" is granted; and

IT IS HEREBY FURTHER ORDERED that plaintiff's Motion for Recovery of Attorney Fees in connection with its efforts to obtain injunctive relief in this action is taken under advisement; and

This document was entered on the docket in compliance with Rule 58 and/or Rule 79 (a), FRCP, on 12/21/89. By: poa

IT IS HEREBY FURTHER ORDERED that defendants shall respond to plaintiff's proposed stipulations dated October 23, 1989, and December 15, 1989, no later than January 18, 1990, and the parties shall respond to all other requests for stipulations within thirty (30) days of the date served; and

IT IS HEREBY FURTHER ORDERED that for any stipulation about undisputed facts requested by plaintiff to which defendants fail to agree and that plaintiff is required to prove, and does prove, plaintiff shall be entitled to an award of costs, including reasonable attorney's fees, expenses in connection with such efforts; and

IT IS HEREBY FURTHER ORDERED that a preliminary pretrial conference in this matter is set for February 6, 1990, at 10:00 a.m.

/s/ L. Clure Morton
L. Clure Morton
United States District Judge

No. 90-5076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Spar Gas, Inc.; Spar Gas Carthage; Mary Ann Catron; William Lyle Catron; Oval Hitchcock; James Preston; Blythe Myers,	)	ORDER
Petitioners.	)	FILED FEB 15 1990

Before: KEITH and NORRIS, Circuit Judges; and JOINER, Senior District Judge*

The petitioners seek a writ of mandamus directing the district court to empanel a jury for trial on the merits of the underlying action. The district court has responded by submitting copies of its opinion and order denying a jury trial on the merits, but granting a jury trial on damages.

Mandamus is an extraordinary remedy, *Kerr v. United States District Court*, 426 U.S. 394 (1976), and will be granted only when the petitioner shows that "its right to issuance of the writ is 'clear and undisputable.' " *In re: Post-Newsweek Stations*, 722 F.2d 325, 329 (6th Cir. 1983) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953)). Mandamus is not a substitute for appeal. *City of Cleveland v. Krupansky*, 619 F.2d 572, 575 (6th Cir.) (per curiam), *cert. denied*, 449 U.S. 834 (1980). We conclude that petitioners have not demonstrated the exceptional

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* The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

circumstances which justify invocation of this extraordinary remedy. *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661-62 (1978).

The petition for a writ of mandamus is **ORDERED** denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, jy
Clerk